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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-22

STERLING OIL OF OKLAHOMA, INC., W. H. JAMES, JR. as individual trustee for Sterling Oil of Oklahoma, Inc. as successor to Albert Barnes Zink as individual trustee for Sterling Oil of Oklahoma, Inc., and HERBERT C. SMYTH as individual trustee for Sterling Oil of Oklahoma, Inc.,
Petitioners,

versus

BART B. CHAMBERLAIN, JR., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No.

STERLING OIL OF OKLAHOMA, INC., W. H. JAMES, JR. as individual trustee for Sterling Oil of Oklahoma, Inc. as successor to Albert Barnes Zink as individual trustee for Sterling Oil of Oklahoma, Inc., and HERBERT C. SMYTH as individual trustee for Sterling Oil of Oklahoma, Inc.,

Petitioners,

versus

BART B. CHAMBERLAIN. JR., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Sterling Oil of Oklahoma, Inc. (Sterling Oil), W. H. James, Jr. as individual trustee for Sterling Oil as successor to Albert Barnes Zink as individual trustee for Sterling Oil (James), and Herbert C. Smyth as individual trustee for Sterling Oil (Smyth), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the

Fifth Circuit entered in the above entitled case on the 9th day of February, 1973 in favor of respondents, Bart B. Chamberlain, Jr. (Chamberlain), G. H. Jett (Jett), The Equity Corporation, Cornwall Trading Corporation, Howard M. Pack (Pack), Joseph Kahn (Kahn), Geo. H. Jett Drilling Co. Inc. (Jett Drilling), James E. Kemp, Kemp Oil Co. Inc., Four States Drilling Co. Inc., and Big Four Oil Co. Inc., herein collectively called the Chamberlain group.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the district court (R. 299-302.) denying the petition of Sterling Oil for a temporary injunction is unreported and is printed in Appendix B hereto, *infra*, p. 27a. Excerpts from the oral statements of the district judge (R. 349-361.) made in connection with the granting of the motion of the Chamberlain group to stay the federal proceedings are printed in Appendix B hereto, *infra*, p. 30a. The order of the district court (R. 361-2.) granting the motion to stay is set forth in Appendix B hereto, *infra*, p. 43a. The reasons advanced by the district judge (R. 403-4.) for granting the stay of the federal proceedings were stated by the district judge in another action involving Chamberlain and are printed in Appendix B hereto, *infra*, p. 44a. The opinion of the district court (R. 395-7.) granting the Chamberlain group's motion for summary judgment is unreported and is printed in Appendix B hereto, *infra*, p. 45a. The opinion of the circuit court of appeals is reported in 474 F.2d 149 and is printed in Appendix B hereto,

infra, p. 4a. The opinion of the circuit court of appeals in the first appeal of this cause is reported in 362 F.2d 723 and printed in Appendix B hereto, *infra*, p. 48a; a writ of certiorari was denied on the first appeal in 385 U.S. 987.

JURISDICTION.

The opinion and judgments of the circuit court of appeals were entered on February 9, 1973, Appendix B hereto, *infra*, pp. 4a, 23a, 24a. Rehearing was denied on March 30, 1973, Appendix B hereto, *infra*, p. 22a. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

1. Does the federal anti-injunction statute, 28 U.S.C. 2283, deprive a district court of jurisdiction in a removed diversity action to enjoin proceedings in a subsequently filed nonremovable state action where (a) the removed plaintiff caused the subsequent state action to be filed by others against himself and the removed defendants, and (b) the removed action had progressed through partial summary judgment, discovery, issuance of pre-trial order, and trial setting, when the removed plaintiff caused the state action to be set for trial ahead of the previously announced trial date of the removed action?

2. May a district court after a jury has been struck abdicate its authority and stay a removed action in-

volving the validity of a contract evidencing a transaction involving commerce and providing for arbitration until the final determination of a subsequently filed nonremovable state action where the removed plaintiff caused the subsequent nonremovable action to be filed by others against himself and the removed defendants and caused the state action to be set for trial ahead of the previously announced trial date of the removed action?

3. Is a judgment obtained in a state court while a federal action is wrongfully stayed *res judicata* in the federal action where, except for the wrongful stay, the federal action would have been determined on the merits?

4. Is an order of a district court staying an action pending the determination of a subsequently filed state action reviewable as an integral part of an appeal from the entry of summary judgment based upon the *res judicata* effect of the final judgment in the subsequently filed state action?

5. Is a party estopped from contending that a federal court has exclusive *quasi in rem* jurisdiction because in a previous appeal the party argued that the action was *in personam?*

STATUTES INVOLVED.

The statutory provisions involved are Sections 1291, 1332(a) and 2283 of the United States Judicial Code, 28 U.S.C. Sections 1291, 1332(a) and 2283, Sections 1 and 2 of the United States Arbitration Act of 1925, as amended, 61 Stat. 670, 9 U.S.C. Sections 1 and 2, and the Civil Rights Act of 1971, R.S. § 1979, 42 U.S.C. 1983. The

statutory provisions involved are printed in Appendix A, *infra*, pp. 1a-4a.

STATEMENT.

On March 26, 1963 Jett and Chamberlain brought suit against Sterling Oil in the Circuit Court of Mobile County, Alabama (Jett-Chamberlain action) seeking a declaratory judgment as to the validity of an agreement made as of May 1, 1959 between Jett, Chamberlain and Sterling (Sterling Agreement) which attempted to define the interest of Jett, Chamberlain and Sterling in an oil field and gathering system purchased by Jett and Chamberlain; the Sterling Agreement provided for arbitration to determine the interest of Sterling Oil in the oil field. (Appendix B, *infra*, pp. 7a, 20a n.12.) Sterling Oil properly removed the Jett-Chamberlain action to the district court pursuant to 28 U.S.C. 1441 because of complete diversity and an adequate amount in controversy and counterclaimed for an accounting and other relief. (Appendix B, *infra*, pp. 8a, 10a; R. 91-95.) Chamberlain unsuccessfully caused Pack, Kahn and Jett Drilling to attempt to intervene in the Jett-Chamberlain action and thereby destroy diversity jurisdiction. (Appendix B, *infra*, pp. 8a, 10a n.4, 13a, 14a n.10, 15a.) While the motions to intervene were pending, Chamberlain caused Pack, Kahn and Jett Drilling to file an action in the Circuit Court of Mobile County, Alabama, "primarily against Jett, Chamberlain, and Sterling Oil (Pack-Kahn action)." (Appendix B, *infra*, pp. 8a, 10a n.4, 13a, 14a n.10, 15a.) The relief requested in the Pack-Kahn action "was identical to that sought in the Jett-Chamberlain action." (Appendix B, *infra*, 8a.) Sterling unsuccessfully attempted to remove the

Pack-Kahn action on the grounds of fraud and a separate controversy.[1] (Appendix B, *infra*, p. 8a.)

In November 1963 Sterling filed an action against Jett and Chamberlain (Sterling Oil action) in the district court requesting the same relief as Sterling had requested in its counterclaim in the Pack-Kahn action (R. 636-639); in November 1966 the district court consolidated the Jett-Chamberlain action and the Sterling Oil action. (R. 131, 132.)

In November 1966 in the Jett-Chamberlain action the district court entered a partial summary judgment finding the Sterling Agreement to be a "valid, enforceable and subsisting agreement" and reserved for future determination the "meaning or enforcement *vel non* of any of the specific provisions of the Sterling Agreement." (Appendix B, *infra*, p. 18a.) In "February 1971, the district court . . . began pre-trial proceedings" and set the Jett-Chamberlain action for trial on July 12, 1971. (Appendix B, *infra*, pp. 9a, 37a, 44a; R. 303.) On March 4, 1971 the district court

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[1]The first appeal, *Jett v. Zink*, 362 F.2d 723 (5th Cir. 1966) cert. *denied*, 385 U.S. 987 (1966), was decided before Sterling Oil was allowed to commence discovery; the facts pertaining to Chamberlain's control over the litigation were developed after the decision in *Jett v. Zink*. (Appendix B, *infra*, pp. 8a-9a, 14a; R. 413, 417-20, 421-2, 426, 432-3, 439, 444.)

According to their own testimony neither Pack, Kahn, nor Jett knew about or participated in the decision to attempt to intervene in the Jett-Chamberlain action or to bring the Pack-Kahn action. (R. 412-20, 421-8, 432-4, 437-9, 444, 448-50.) Pack acknowledged that taking the case out of the jurisdiction of the federal court and putting it into the state court was a satisfactory reason for filing the Pack-Kahn action if it would accomplish its purpose. (R. 451-2.) A summary of the testimony of Pack, Kahn and Jett pertaining to their nonparticipation in the litigation appears in Appendix D, *infra*, pp. 67a-70a.)

held its pre-trial hearing and entering its pre-trial order. (R. 248-252.) On March 5, 1971 Chamberlain moved the state court to set the Pack-Kahn action for trial on May 3, 1971,[2] (Appendix C, *infra*, pp. 63a-66a; R. 270-1, 563-5.) On March 8, in an *ex parte* order the state court set the Pack-Kahn action for trial on May 3, 1971. (Appendix B, *infra*, p. 10a; R. 567.)

Sterling Oil sought an injunction against the state proceeding on the grounds that Sterling Oil had a right under the removal statutes to have its controversy with Chamberlain determined in a federal forum, to prevent harassment of a federal litigant through the state proceeding, and because the federal court had exclusive *quasi in rem* jurisdiction over the interest of Sterling Oil, Jett and Chamberlain in the oil field and gathering system that were the subject of the Sterling Agreement. (Appendix B, *infra*, pp. 10a, 15a-16a, 29a.) The district court denied injunctive relief, concluding that the Jett-Chamberlain action "is *in personam* and the court is without jurisdiction to issue the desired injunction." (R. 300.) The district court reasoned that (R. 300-301.)

> Sterling is requesting the court to interpret the Sterling agreement and order specific performance of the contract as interpreted. Money damages are requested for injuries already

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[2]The circuit court of appeals erroneously stated that the "Chamberlain group filed in the state court a motion to have the Pack-Kahn action set for trial before the Jett-Chamberlain action" (Appendix B, *infra*, p. 10a.); the motion was actually filed by Chamberlain only; the remainder of the Chamberlain group accepted service and waived "notice of the hearing of same." (Appendix C, *infra*, pp. 63a, 65a-66a; R. 563-6; Appendix B, *infra*, p. 44a.)

> sustained and in lieu of specific performance if performance is not possible. In this posture there is no necessity of this court having possession of the leases or properties. Sterling has agreed to take money damages as a substitute.

The circuit court of appeals held that Sterling Oil was estopped to claim that the Jett-Chamberlain action was *quasi in rem*[3] (Appendix B, *infra*, p. 17a.) and that "Chamberlain had been given authority to act for Pack, Kahn, and Jett, and he was justified in bringing suit in their names to protect their interests." (Appendix B, *infra*, p. 15a.)

On July 10, 1971 the state court held the Sterling Agreement to be "valid, . . . reserving for future determination . . . the meaning and enforceability *vel non* of the specific provisions of the Sterling Agreement." (R. 320-2; Appendix B, *infra*, p. 10a.)

On July 12, 1971, the day the trial of the Jett-Chamberlain action was to begin, "Chamberlain's group . . . filed a motion in the district court to stay the federal proceedings pending a final determination" of the Pack-Kahn action in the state court. (Appendix B, *infra*, pp. 10a-11a.) The federal court struck a jury and continued the cause until July 14, when

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[3]Neither Sterling Oil, the Chamberlain group nor the circuit court of appeals used the words "*in personam*", "*quasi in rem*" or "*in rem*" in briefs or opinion in the first appeal. Sterling Oil argued that Jett and Chamberlain had "personal obligations" to convey a portion of the oil properties owned by Jett and Chamberlain to Sterling; such an argument is consistent with the federal court's "*quasi in rem*" jurisdiction over the interests of Jett and Chamberlain in the properties. (Appendix B, *infra* pp. 16a, 58a, 61a.)

the district court, without opinion, granted the motion to stay and declared a mistrial.[4] (R. 348, 361-3; Appendix B, *infra*, pp. 10a-11a.) On July 16, 1971 the district court denied the motion of Sterling Oil for a permanent injunction against the prosecution of the Pack-Kahn action. (Appendix B, *infra*, p. 11a.)

In November 1971 the state court "set aside and cancelled" its decree holding the Sterling Agreement valid and held that the Sterling Agreement was "not valid and enforceable." (R. 386-390, Appendix B, p. 11a.) On January 27, 1972 "the district court granted the Chamberlain group's motion for summary judgment (in the Jett-Chamberlain action and the Sterling Oil action) based on the res judicata effect of the state court decree." (Appendix B, *infra*, p. 11a.)

Sterling Oil timely appealed from the order of the district court denying Sterling Oil's petition for a permanent injunction (R.364-5), and on November 1, 1971 Sterling Oil amended its notice of appeal to include the order granting the stay. (R. 397.) Sterling Oil timely appealed from the summary judgment. (R. 398-9.)

The court of appeals dismissed the appeal from the stay order as untimely (Appendix B, *infra*, p. 20a, n.12)

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[4]Although the district court did not enter an opinion, in another action in which Chamberlain was a party, the district court said:

> "After this court's announced trial date . . . Chamberlain secured an earlier trial setting in the state court and began the taking of testimony prior to the setting in this court. Therefore, when the cases were called for trial in this court, it was necessary to stay the action here pending the outcome in the state court." (R. 403-4; Appendix B, *infra*, p. 44a.)

and refused to review the stay as a part of the appeal from the final judgment.[5]

The court of appeals concluded that "even when viewed collectively," Sterling Oil's theories "fail to establish the impropriety of the state action necessary to overcome the restrictive contraction placed on section 2283" by *Atlantic C.L.R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970). (Appendix B, *infra*, p. 20a.)

REASONS FOR GRANTING THE WRIT.

1. The issues presented here are of importance in defining the scope of the right of a removing defendant to have his controversy determined in a federal forum and just what, if anything, the removed plaintiff may do to deprive the removing defendant of his "right granted by Congress to have the federal court decide the issues presented." *French v. Hay*, 22 Wall 250 (1873); see *Donovan v. Dallas*, 377 U.S. 408, 413 (1964).

Both the court of appeals and the trial court were of the opinion that the federal anti-injunction statute, 28 U.S.C. §2283, prohibited federal courts from enjoining subsequent state proceedings fomented and controlled by a plaintiff in a removed action. (Appendix B, *infra*, pp. 12a, 20a, 27a-28a.) The reliance of the court of appeals on the anti-injunction statute in declining to protect Sterling Oil's right to a federal forum in its dispute with Jett and Chamberlain appears to

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[5]Reviewability of the stay as an integral part of the appeal from the summary judgment was specifically raised in the petition for rehearing.

be in direct conflict with the long recognized principle that the anti-injunction statute does not apply to removed actions. *French v. Hay*, 22 Wall 250 (1873); *Mitchum v. Foster*, 407 U.S. 225, 234 (1972).

The court of appeals did recognize that it was faced with an important issue of the respective jurisdictions of state and federal courts. The court of appeals found that the "now apparent fact that Chamberlain controlled both pieces of litigation is cause for serious concern" (Appendix B, *infra*, p. 15a) and again recognized that the result of its decision in *Jett v. Zink*, 362 F.2d 723, 730 (5th Cir. 1966), *cert. denied*, 385 U.S. 987 (1966), (Appendix B, *infra*, p. 9a.)

> is unfortunate in that it leaves the same issues pending simultaneously in a state and federal court but we see no escape from our conclusion. The parties here brought it upon themselves in their battle over the forum in which to try their case.

The Court has not had the opportunity to determine whether the principle enunciated in *French v. Hay*, 22 Wall 250 (1873), applies to a case where, as here, the removed plaintiff causes persons who are not parties to the removed action to file a nonremovable action in a state court against all of the parties to the properly removed action.

The questions presented are of importance because the "prompt, economical and sound administration of justice depends to a large degree upon definite and

finally accepted principles governing important areas of litigation, such as the respective jurisdictions of federal and state courts." *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 8 (1951).

2. The court of appeals acknowledged that its first "decision signaled the start of a race to the courthouse." (Appendix A, *infra*, p. 9a.) If a removing defendant must win a race to the courthouse to effect his Congressionally granted right to a trial in a federal forum, this Court should, we submit, formulate the rules for the race.

3. The failure of the court of appeals to review the interlocutory order staying further proceedings in the federal action as an integral part of the appeal from the summary judgment is in direct conflict with the decision of the Second Circuit in *Allied Air Freight, Inc. v. Pan American World Airways, Inc.*, 393 F.2d 441, 443 (2d Cir. 1968), *cert. denied*, 393 U.S. 846 (1968), where the court held that "in the interest of efficient judicial administration . . . we should review the interlocutory stay order on this appeal from a final order dismissing the action" and with the decision of the District of Columbia Circuit in *Taylor v. Washington Terminal Company*, 409 F.2d 145, 147 (D.C. Cir. 1967), *cert. denied*, 396 U.S. 835 (1969).

The failure of the court of appeals to review the stay of the federal proceedings justifies the exercise of this Court's power of supervision to correct the drastic departure from the accepted and usual procedure of reviewing all interlocutory orders on an appeal from a final judgment.

4. The district court intentionally abdicated federal jurisdiction when it granted the stay; the trial court stated (Appendix B, *infra*, p. 42a; R. 360):

> regardless of how that case (Pack-Kahn action) goes down there I expect to hold the case as Res Judicata and dismiss it from this docket.

The granting of the stay by the trial court is in direct conflict with *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943), which established that a district court may not deprive a diversity litigant of a federal forum by staying an action absent exceptional circumstances not present here.

Here, the trial court granted the stay because after the setting of the trial date of the federal action "Chamberlain secured an earlier trial setting in the state court and began the taking of testimony." (Appendix B, *infra*, p. 44a.) The reasoning behind the stay is in direct conflict with the principle enunciated in *Donovan v. Dallas*, 377 U.S. 408, 413 (1964), that once jurisdiction of the federal court and the right of the litigant to prosecute his suit in a federal forum is established, such "right cannot be arrested or taken away by another court."

5. Chamberlain has effectively deprived Sterling Oil of its Congressionally created right to have its dispute with Jett and Chamberlain determined in a federal forum. Apart from the removed action exception to 28 U.S.C. §2283, the Civil Rights of 1871, 42

U.S.C. §1983, as construed in *Mitchum v. Foster*, 407 U.S. 225, 237 (1972), appears to entitle a federal litigant protection from subsequently filed state actions designed to frustrate the federal litigant's right to trial in a federal court.

We submit that Chamberlain acted in "bad faith," to deprive Sterling Oil of a federal forum. *Younger v. Harris*, 401 U.S. 37, 49 (1971). Chamberlain also created "needless friction" between the state and federal courts. (Appendix B, *infra*, pp. 31a, 39a-40a.) See *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 8-9 (1940).

This cause, we submit, presents the Court an opportunity to decide "exactly how great a restraint is imposed . . . ["by the principles of equity, comity, and federalism"] on a federal court asked to enjoin state *civil* proceedings." *Mitchum v. Foster*, 407 U.S. 225, 244 (1972) (concurring opinion).

6. The holding of the court of appeals that Sterling Oil is estopped from contending that the district court had exclusive *quasi in rem* jurisdiction over the interest of Jett, Chamberlain and Sterling Oil in an undivided interest in the oil field because Sterling Oil argued that the Jett-Chamberlain action was *in personam* on the first appeal, disregards the principle that a party can neither confer jurisdiction on a court where none exists nor deprive the court of jurisdiction that does exist and is in conflict with the decision in *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17-18 (1951).

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated at Mobile, Alabama, this 26th day of June, 1973.

Respectfully submitted,

WILLIS C. DARBY, JR.,
Counsel for Petitioners,
Post Office Box 2565
Mobile, Alabama 36601

PROOF OF SERVICE.

I, Willis C. Darby, Jr., the attorney for Sterling Oil of Oklahoma, Inc., James and Smyth, the Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of June, 1973, I served copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the several parties thereto by mailing copies in duly addressed envelopes, with first class postage prepaid to their respective attorneys of record as follows:

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To Joseph M. Matranga, Esquire, Attorney for G. H. Jett and Geo. H. Jett Drilling Co. Inc.,
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APPENDIX A

STATUTES INVOLVED

UNITED STATES ARBITRATION ACT OF 1925
9 U.S.C. Section 1-2

Section 1. "Maritime transactions; and "commerce" defined; exceptions to operation of title

"Maritime transactions":, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. July 30, 1947, c. 392, 61 Stat. 670.

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving com-

merce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. July 30, 1947, c. 392, 61 Stat. 670.

UNITED STATES JUDICIAL CODE
28 U.S.C. 1291

FINAL DECISIONS OF DISTRICT COURTS

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for thte District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. As amended Oct. 31, 1951, c. 655, § 48,65 Stat. 726; July 7, 1958, Pub.L. 85-508, § 12(e), 72 Stat. 348.

UNITED STATES JUDICIAL CODE
28 U.S.C. 1332(a)

DIVERSITY OF CITIZENSHIP

The district courts shall have original jurisdiction of all civil actions where the matter in controversy

exceeds the sum or value of $10,000, exclusive of interest and costs, and is between —

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

UNITED STATES JUDICIAL CODE
28 U.S.C. 1441(a)

ACTIONS REMOVABLE GENERALLY

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

UNITED STATES JUDICIAL CODE
28 U.S.C. 2283

FEDERAL ANTI-INJUNCTION STATUTE

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

CIVIL RIGHTS ACT OF 1871

TITLE 42 SECTION 1983

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
R.S. § 1979.

APPENDIX B

Opinions and Orders Below

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2745

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Plaintiffs-Appellees,
versus

ALBERT BARNES ZINK, as Individual Trustee for Sterling Oil of Oklahoma, Inc.,
Defendant,

STERLING OIL OF OKLAHOMA, INC., ET AL.,
Defendants-Appellants.

No. 72-1637

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Plaintiffs-Third Party
Plaintiffs-Appellees,

versus

ALBERT BARNES ZINK, as Individual Trustee for Sterling Oil of Oklahoma, Inc.,
Defendant,

W. H. JAMES, JR., Etc., HERBERT C. SMYTH and STERLING OIL OF OKLAHOMA,
Defendants-Appellants,

CORNWALL TRADING CORPORATION, ET AL,
Third Party
Defendants-Appellees.

ALBERT BARNES ZINK, as Individual Trustee for STERLING OIL OF OKLAHOMA, INC.,
Plaintiff,

W. H. JAMES, JR., Etc., HERBERT C. SMYTH and STERLING OIL OF OKLAHOMA,
Plaintiffs-Appellants,
versus

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Defendants-Third Party
Plaintiffs-Appellees,

CORNWALL TRADING CORPORATION, ET AL,
Third Party
Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Alabama

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(February 9, 1973)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

DYER, Circuit Judge: These appeals are before us for the third and hopefully final time in the protracted litigation over the purchase of certain oil leases and a gathering system in or near Mobile County, Alabama. As in each of the two previous appeals, the questions presented do not concern the merits of the dis-

pute, but instead ask us to decide the forum — state or federal — in which the "main" battle should properly be joined. We find that the district court's refusal to enjoin the pending state court proceeding and its recognition of the res judicata effect of that court's final judgment were not erroneous. Therefore we affirm the judgment of the district court in both appeals.

When this case was first before this court we described the state of the litigation as it existed in early 1964 as "convoluted." *Jett v. Zink*, 5 Cir. 1966, 362 F.2d 723, *cert. denied*, 385 U.S. 987. The ensuing eight years have clarified little except Chamberlain's unabated desire to have the case heard in a state court and Sterling Oil Company's equally strong preference for a federal court. To understand our resolution of these competing interests in the two present appeals we find it necessary to repeat a small portion of the voluminous procedural history of this case.[1]

I. *Factual Background*

In 1963 Jett and Chamberlain brought suit against Sterling Oil in the Circuit Court of Mobile County, Alabama, seeking a declaratory judgment as to the validity of the "Sterling Agreement,"[2] or, in the alternative, a favorable construction of that agreement. (This case will be referred to as the Jett-Chamberlain ac-

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[1]The merits of the dispute, the extent that they concern us, are adequately set out in our 1966 opinion. 362 F.2d 723.

[2]The Sterling Agreement entered into by Jett, Chamberlain, and Sterling Oil attempted to define the interests of these parties in an oil field purchased by Jett and Chamberlain. The Agreement is described in greater detail in 362 F.2d at 727.

tion.) There being complete diversity among the parties and an adequate amount in controversy, Sterling Oil removed the case to federal court. Soon thereafter, petitions were filed on behalf of Pack, Kahn, and Geo. H. Jett Drilling Company, among others, to intervene in the removed action; Jett and Chamberlain then moved to add these parties as plaintiffs, and, based on the anticipated granting of all these motions, moved to remand for lack of diversity jurisdiction. While the motions were pending, the three intervenors had a suit filed on their behalf, primarily against Jett, Chamberlain, and Sterling Oil, in the Circuit Court of Mobile County, Alabama. (This case will be referred to as the Pack-Kahn action.) The requested relief was identical to that sought in the Jett-Chamberlain action. Despite an apparent absence of complete diversity in the Pack-Kahn action, Sterling Oil removed it, alleging fraudulent joinder and the existence of a separable controversy.[3] Pack and Kahn then had motions filed to remand. On January 6, 1964, the district court denied the petitions to intervene and the motions to remand, and Jett, Chamberlain, Pack, and Kahn appealed.

Although the exact scope of our opinion disposing of these appeals is questioned it clearly decided two things. First, in the Jett-Chamberlain appeal we said that, since none of the non-party petitioners was an indispensable party, the district court's refusal to remand the case was proper. Secondly, in the Pack-Kahn

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[3]Sterling Oil also filed a suit against Jett and Chamberlain in federal court asking for various forms of relief under the Sterling Agreement that amounted to the same relief sought in its counterclaim in the Jett-Chamberlain action.

appeal we held that, on the state of the record as it existed then, there was no clear and persuasive evidence of fraud inherent in the bringing of that action while motions to intervene in the Jett-Chamberlain action were still pending; we thus ordered the Pack-Kahn action remanded.

With the decision made that the federal forum was appropriate for one action and inappropriate for the other, the opinion concluded:

> The result is unfortunate in that it leaves the same issues pending simultaneously in a state and federal court but we see no escape from our conclusion. The parties here brought it upon themselves in their battle over the forum in which to try their case.

362 F.2d at 730.

As all parties now concede, our decision signaled the start of a race to the courthouse. Despite our signal, which was supposed to remove the brakes from the wheels of justice, it took an additional five years for either of the cases to get in gear. The interim saw a great deal in the way of sparks — extensive discovery, another unsuccessful removal, and interminable procedural squabbling — but little motion down the road to a decision. Finally, in February 1971, the district court, on its own motion, began pre-trial proceedings that were intended to lead to a federal trial beginning July 12, 1971. In response to this federal

warm-up, Chamberlain's group[4] filed in the state court a motion to have the Pack-Kahn action set for trial before the Jett-Chamberlain action; it ultimately was set for trial May 4, 1971. Sterling Oil in turn reacted to this development on April 15, 1971, by asking the district court for a preliminary and permanent injunction against the state court proceeding. On April 20, 1971, the district court heard argument on the motion for preliminary injunction and on April 28, 1971, denied relief. Sterling Oil appealed this denial, but was unsuccessful in obtaining an injunction pending appeal from either the district court or this court.[5] Subsequently this appeal was dismissed for lack of prosecution.

With the final impediment removed, the state court began six weeks of hearings in the first phase of its trial — determining the validity *vel non* of the Sterling Agreement — and on July 10, 1971, that court entered an interlocutory decree finding it valid. Having made extensive, although at that point unsatisfactory, progress in the resolution of several substantial questions and having invested considerable time, Chamberlain's group on July 12, 1971, the day the federal trial was to begin, filed a motion in the district court to stay the federal proceedings pending a final determination

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[4]The term "Chamberlain's group" has reference to the apparent control given Chamberlain over the two related cases by virtually all interested persons, except of course Sterling Oil. This control is apparent from the deposition of Pack, Kahn, and Jett, and from an agreement entered into between Chamberlain, Cornwall, Citronelle Properties, Inc., and The Equity Corporation. See Part II A of this opinion *infra*.

[5]Sterling Oil also applied for prohibitory relief in the Alabama Supreme Court. After a hearing on April 30, 1971, that application was denied on May 3, 1971.

in the state court. After hearings on July 12 and 14, the district court granted that motion. Additionally, at the hearing on July 14, Sterling Oil's petition for permanent injunction filed on April 15, 1971, was submitted to the court without further argument; this petition was denied July 16, 1971. Sterling Oil's appeal from this denial is before us as appeal number 71-2745.[6]

Free of the complications that a simultaneous federal trial would have caused, the state court reconvened on August 2, 1971, for phase two of its trial. After weeks of hearings, that court issued its final decree November 4, 1971. Withdrawing its interlocutory decree of July 10, it found the Sterling Agreement to be unenforceable, but subsequently held that Sterling Oil was entitled to a finders fee and reasonable compensation for services totaling in excess of $500,000. This decree was incorporated into the pleadings of the Jett-Chamberlain action and on January 27, 1972, the district court granted the Chamberlain group's motion for summary judgment based on the res judicata effect of the state court decree. Sterling Oil's appeal from the summary judgment is before us as appeal number 72-1637.[7]

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[6]Sterling Oil later amended its Notice of Appeal to include the district court's order of July 14, 1971, which granted a stay of the federal proceedings. *See* footnote 12 *infra*.

[7]The federal action filed by Sterling Oil (see footnote 3 *supra*) had been consolidated with the Jett-Chamberlain action for trial and was included within the scope of the district court's order granting summary judgment.

II. *Number 71-2745*

Separated from the chaff, Sterling Oil's argument essentially is that its right to proceed in a federal forum has been frustrated by the district court's refusing to halt the pending state court action. Recognizing that in order to be entitled to such an injunction it must come within the provisions of 28 U.S.C.A. § 2283.* Sterling Oil has advanced four theories in support of its position. Our examination of these theories, however, must proceed from a proper awareness of the potential state-federal conflicts generated by that section and its predecessors, as recently explained by the Supreme Court in *Atlantic C.L.R.R. v. Brotherhood of Locomotive Engineers*, 1970, 398 U.S. 281. The Court there cautioned against loose construction of the exceptions to section 2283, and stated that any doubts about the propriety of such a federal injunction should be resolved in favor of permitting the state courts to proceed, "with relief from error, if any, through the state appellate courts and ultimately this Court." 398 U.S. at 287. This statement is particularly relevant where, as is the case here, the final state judgment is currently on appeal in the Alabama state court system.

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*28 U.S.C.A. § 2283 provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

A. *Fraud*

Because no Act of Congress expressly authorizes an injunction in this situation, Sterling Oil has relied primarily upon qualifying under the "where necessary in aid of its jurisdiction" language, one of the other two exceptions to section 2283. It first argues that the Pack-Kahn action, filed after the district court had obtained jurisdiction over the Jett-Chamberlain action by removal, raised identical issues and was a fraudulent attempt by Chamberlain to defeat federal jurisdiction. Because a federal district court after removal may enjoin further state proceedings in that action by a plaintiff (*see Lowe v. Jacobs*, 5 Cir. 1957, 243 F.2d 432, *cert. denied*, 355 U.S. 842, *Peters v. Standard Oil Co.*, 5 Cir. 1949, 174 F.2d 162, and *Armstrong v. Alliance Trust Co.*, 5 Cir. 1942, 126 F.2d 164), Sterling Oil argues that a federal court should enjoin a state proceeding fraudulently brought by the original plaintiff but in the name of third persons, if that action is in fact merely an attempt to litigate in state court the same issues already removed.

The evidence in the record upon which Sterling Oil bases its allegations of fraud is of two kinds. First there are depositions of Pack, Kahn, and Jett which show that, although they were financially interested in the dispute with Sterling Oil, they did not follow the litigation closely and did not originate the idea of either intervening in the Jett-Chamberlain action in federal court or bringing the Pack-Kahn action in state

court.[9] Instead each individual stated that his interests were similar to Chamberlain's and that he had given Chamberlain general authority to act on his behalf in the litigation. The second kind of evidence is documents showing that Chamberlain acted on this authority to retain counsel for his "group" and to have that counsel file the Pack-Kahn action.[10]

At two different times in 1966 we had occasion to consider partially developed allegations of fraud in the Pack-Kahn action. On the first appeal, confronted only with the fact that the action had been filed while the plaintiffs' petitions to intervene were still pending, we invoked the hornbook rule that "fraud is never presumed but must be established by clear and persuasive evidence" and concluded that no fraud had been proved. After the Supreme Court had denied certiorari on that appeal, Sterling Oil moved this court to recall its mandate, claiming that the just completed Jett deposition raised "serious questions" as to the true motivation behind the bringing of the Pack-Kahn action. This motion was denied.

Sterling Oil now says that all the evidence of fraud is before us and asserts that "the admissions of Pack, Kahn and Jett conclusively establish that the only pur-

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[9]Despite indications in the record that some other parties had intended to join as plaintiffs in the Pack-Kahn action, the only named plaintiffs were Pack, Kahn, and Geo. H. Jett Drilling Company, which was controlled 100% by Jett.

[10]This same counsel also apparently prepared and filed the Jett-Chamberlain action, prepared and filed the petitions to intervene in that action, and assisted in the preparation of the answer of several defendants to the Pack-Kahn action. All of these services were billed to Chamberlain.

pose of the Pack-Kahn action was to deprive Sterling Oil of Sterling's federally created right to have the Jett-Chamberlain-Sterling controversy decided in a federal forum." We disagree. As we stated on the first appeal:

> "There was good reason for bringing the second suit in order to assure the plaintiffs therein [Pack, Kahn, and Geo. H. Jett Drilling Company] a day in court in the event that they were not admitted as parties plaintiff in the earlier suit, as indeed they were not. The question is whether they have stated a cause of action against any of the defendants whose presence in the litigation would destroy complete diversity of citizenship of the parties. We think they have."

362 F.2d at 729-30. The now apparent fact that Chamberlain controlled both pieces of litigation is cause for serious concern, but it does not constitute "clear and persuasive evidence" of fraud. Chamberlain had been given authority to act for Pack, Kahn, and Jett and he was justified in bringing a suit in their names to protect their interests.

B. *Quasi In Rem Jurisdiction*

Sterling Oil's second ground for seeking an injunction as "necessary in aid of [the federal court's] jurisdiction" is its argument that the Jett-Chamberlain action is quasi in rem and that once the federal court took jurisdiction of that case, it was required to protect

it by enjoining a state action which raised identical issues. *See generally Pacific Indemnity Co. v. Acel Delivery Service, Inc.*, 5 Cir. 1970, 432 F.2d 952, *cert. denied*, 1971, 401 U.S. 955. Sterling Oil contends that the action is one to settle title to and rights in certain property, that it asked for an accounting in its counterclaim and later has requested specific performance, and that the whole agreement gave it an equitable lien and imposed a constructive trust on Jett and Chamberlain.

To dispose of this quasi in rem contention we need only look to the first appeal in this case and to the assertions of the parties before the court at that time. Although the legal questions there centered on the indispensability of certain parties, much of the argument was directed at determining whether the Jett-Chamberlain action was in rem, quasi in rem, or in personam. In an attempt to defeat the arguments as to indispensability of parties, Sterling argued throughout its briefs that the Sterling Agreement was carefully drawn to make the obligations of Jett and Chamberlain *personal* obligations, that the Agreement was a mere contract to pay money and transfer oil royalties, and that the Agreement clearly stated that it did not operate as a conveyance to Sterling of any interest in the leases or any other estate in land. Jett and Chamberlain, on the other hand, maintained that the controversy unquestionably concerned an interest in land From this Sterling now argues that, becuase we stated in the first appeal that the Sterling Agreement bound Jett and Chamberlain to convey "certain 'overriding royalties' and other interests in properties," we reject-

ed its earlier contentions that the action was in personam, 362 F.2d at 727; thus it concludes that it is not precluded from adopting a new argument after its initial argument was rejected. We find little merit in this contention.

There is nothing in our first opinion which would indicate that we rejected the in personam theory advanced by Sterling Oil. Sterling Oil argues that we held that the Sterling Agreement purported to convey interests in real property; actually we held that the Agreement bound *Jett* and *Chamberlain* to convey such interests at some later date. If our earlier decision can be read to have any effect on the question of the status of the Jett-Chamberlain action, it would be that the opinion is more consistent with Sterling Oil's first line of argument than it is with Sterling Oil's new position. It is inconceivable that this court would have allowed the Pack-Kahn action to be remanded if, after extensive argument on the quasi in rem-in personam argument, it in fact had concluded that the action was one which required the exclusive jurisdiction of the federal court. Sterling Oil has argued one position before this court and now, after obtaining the benefit of that position, has advanced an admittedly inconsistent position in hopes of prevailing again. We hold that it is precluded from utilizing such a tactic. *Cf. Scarano v. Central R. Co.*, 3 Cir. 1953, 203 F.2d 510; *Iselin v. La Coste*, 5 Cir. 1945, 147 F.2d 791; *Texas Co. v. Gulf Refining Co.*, 5 Cir. 1928, 26 F.2d 394, *cert. denied*, 278 U.S. 625.

C. *Partial Summary Judgment*

As an alternative basis for reversal Sterling Oil argues that, because of a partial summary judgment entered by the district court on November 3, 1966, in the Jett-Chamberlain action, an injunction should have been issued "to protect or effectuate its judgment." We hold that this judgment is not within the scope of the third exception of section 2283.

Jett and Chamberlain's original complaint alleged that the Sterling Agreement was null and void because Sterling Oil had not qualified to do business in Alabama at the time the Agreement was entered into. Alternatively, they asked for a declaratory judgment construing the contract favorably to them. On August 19, 1966, Sterling Oil moved for a partial summary judgment on the sole question whether it had qualified to do business at the proper time; it also asked for a "declaratory judgment that the Sterling Agreement is a valid existing agreement ...." This motion was granted November 3, 1966, and the court's order found the Agreement to be a "valid, enforceable and subsisting agreement." That order, however, was supplemented by a new order on November 15, 1966, which explained that the court's earlier order was only intended to dispose of the question of Sterling's qualifying to do business. The November 15 order continued:

> in using such language [as to the validity of the Agreement] the court had no intention of determining the meaning or enforceability *vel non* of any of the specific provisions of the Ster-

ling Agreement which are the subject of controversy between the parties to this cause.

If any doubt remained as to the limited scope of this order, it was removed on March 11, 1971, when the district court denied Sterling Oil's motion, based on the partial summary judgment, to strike amendments to Jett and Chamberlain's complaint and answer to counterclaim. These amendments, filed April 17, 1968, questioned the validity of the Sterling Agreement on grounds of fraud, misrepresentation, duress, and business compulsion. Thus, the district court refused to give its 1966 order final res judicata effect on the question of the validity of the Sterling Agreement. That it was not necessary to protect this "judgment" by an injunction is also apparent from the state of the record on July 16, 1971, the date the injunction was denied. At that time both the district court and the state court had found the Sterling Agreement valid insofar as Sterling Oil's having qualified to do business was concerned. No conflict existed and, in the absence of any other reason for protecting the partial summary judgment, the district court had rendered no judgment that warranted protection under section 2283.

D. *Pendency of Two Suits*

Finally, Sterling Oil contends that, under Alabama law, the pendency of both a state and a federal case involving the same parties and issues is vexatious as a matter of law and argues that this entitles it to an

injunction of the state proceeding.[11] Regardless of the Alabama law on this question, it is clear under federal law that the dual court structure of our federal system creates a situation in which the same case can be heard simultaneously in a state court and a federal court. *See e.g., Kline v. Burke Construction Co.*, 1922, 260 U.S. 226. We recognized that this was such a case in our first opinion. 362 F.2d at 730. Since the determination whether a federal injunction of a state proceeding should issue under section 2283 must be made by reference to federal law, we conclude that two such actions can proceed concurrently so long as it has not been demonstrated that either is in rem or quasi in rem.

Taken separately, none of Sterling Oil's theories properly entitle it to an injunction against the state proceeding; even when viewed collectively they fail to establish the impropriety of the state action necessary to overcome the restrictive construction placed on section 2283 by *Atlantic C.L.R.R., supra.*[12]

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[11]Sterling Oil cites for this proposition, *Watson v. Mobile & O.R.R.*, Ala. 1937, 173 So. 43, which states that the pendency of the *federal* case may be pled in abatement in the *state* action. *See also Fegaro v. South Central Bell*, Ala. 1971, 252 So.2d 66.

[12]Sterling Oil has also attempted to attack, by amended notice of appeal in No. 71-2745, the validity of the district court's order of July 14, 1971, staying the Jett-Chamberlain action. *See* footnote 6 *supra*. In addition to there being a serious question about whether the order was appealable (see *Jackson Brewing Co. v. Clarke*, 5 Cir. 1962, 303 F.2d 844, *cert. denied*, 371 U.S. 891), Sterling Oil's amended notice of appeal was filed far beyond the time limit allowed for such notices by Fed. R. App. P. 4(a). The order was entered on July 14, 1971, but the amended notice of appeal was not filed until November 1, 1971. As such this aspect of appeal No. 71-2745 is dismissed.

III. *72-1637*

Sterling Oil has advanced only one argument as to why, with the Jett-Chamberlain action stayed and the Pack-Kahn action free to proceed, a final judgment in the latter should not be res judicata in the former. It contends that the district court considered the July 10, 1971, order of the state court res judicata and that the parties agreed on July 14, 1971, to raise no "new issues" in the state court if that action were allowed to continue. This statement, while correct, does not aid Sterling Oil. The July 10 state court order was virtually identical to the November 15, 1966, partial summary judgment in the district court, and dealt with Sterling Oil's having qualified to do business. While withdrawn by the state court's final judgment, it was not contradicted; instead the Sterling Agreement was invalidated on grounds which had already been incorporated in the federal pleadings prior to July 14, 1971 and which were therefore not "new" in terms of the parties' agreement. Because it was conceded that the Pack-Kahn action raised issues which were identical to those raised in the Jett-Chamberlain action, we hold

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In its argument on the propriety of this stay order, Sterling Oil made an oblique reference to the Federal Arbitration Act, 9 U.S.C.A. § 1 et seq. To the extent that this argument is addressed to the stay order, the above dismissal disposes of it. If, however, Sterling Oil is arguing that this Act supports in some way its request for an injunction, we need only point out that the Act provides no independent right to a federal forum. *See Ballantine Books, Inc. v. Capital Distributing Co.*, 2 Cir. 1962, 302 F.2d 17; *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 2 Cir. 1961, 287 F.2d 382, *cert. denied*, 368 U.S. 817; *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 2 Cir. 1959, 271 F.2d 402, *cert. granted*, 1960, 362 U.S. 909, *petition for cert. dismissed per stipulation*, 364 U.S. 801.

that the district court correctly granted summary judgment in the Jett-Chamberlain action based on the final state judgment in the Pack-Kahn action.

Number 71-2745 is dismissed in part and affirmed in part, and number 72-1637 is affirmed.

ORDER DENYING MOTION FOR REHEARING FIFTH CIRCUIT COURT

(March 30, 1973)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1972

No. 71-2745

D. C. Docket No. 3010-63

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Plaintiffs-Appellees,
versus

ALBERT BARNES ZINK, as Individual Trustee
for Sterling Oil of Oklahoma, Inc.,
Defendant,
STERLING OIL OF OKLAHOMA, INC., ET AL,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Alabama

Before COLEMAN, AINSWORTH and DYER,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the amended notice of appeal filed November 1, 1971 be, and the same is hereby dismissed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

February 9, 1973

Issued as Mandate: Apr 9, 1973

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 1972

No. 72-1637

D. C. Docket Nos. CA 3010-63 & 3192-63

G. H. JETT and BART B. CHAMBERLAIN, JR.,
Plaintiffs-Third Party
Plaintiffs-Appellees,
versus

ALBERT BARNES ZINK, as Individual Trustee for Sterling Oil of Oklahoma, Inc.,
Defendant,
W. H. JAMES, JR., Etc., HERBERT C. SMYTH and STERLING OIL OF OKLAHOMA,
Defendants-Appellants,
CORNWALL TRADING CORPORATION, ET AL,
Third Party Defendants-Appellees.

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ALBERT BARNES ZINK, as Individual Trustee for Sterling Oil of Oklahoma, Inc.,
Plaintiff,
W. H. JAMES, JR., Etc., HERBERT C. SMYTH and STERLING OIL OF OKLAHOMA,
Plaintiffs-Appellants,
versus
G. H. JETT and BART B. CHAMBERLAIN, JR.,
Defendants-Third Party Plaintiffs-Appellees,
CORNWALL TRADING CORPORATION, ET AL,
Third Party Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Alabama

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Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-third party plaintiffs-appellees and third party defendants-appellees the costs on appeal to be taxed by the Clerk of this Court;

It is further ordered that plaintiffs-appellants pay to defendants-third party plaintiffs-appellees and third party defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

February 9, 1973

Issued as Mandate: APR 9 1973

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

(Number and Title Omitted)

Filed: April 28, 1971

The facts of this "convoluted" case were well summarized by the Fifth Circuit in *Jett v. Zink*, 362 F.2d 723 (5th Cir. 1966). The case has now been set for trial by this court; this setting has set off a surge of activity by all concerned. When the trial date was announced plaintiffs, counter-claim defendants (Jett-Chamberlain) obtained a trial date for the sister state court litigation (identified as the Pack-Kahn suit by the Fifth Circuit); the state court trial is set earlier than the federal. This earlier setting has induced the defendants, counter-claim plaintiffs (Sterling) to move this court to enjoin the state trial.[1]

Any motion for a federal injunction against a state court suit must first meet the requirements of 28 U.S.C.A. §2283. This section forbids federal stays [429] of state cases except in three circumstances: (1) when specifically authorized by Congress, (2) when necessary to aid the federal court's jurisdiction, and (3) to effectuate the federal court's order. There has been no suggestion that the first exception applies to this case; the requested injunction must, therefore, come within the second or third exception if it is to be issued. *Atlantic Coast Line R. Co. v. Brotherhood*

[1]Sterling also filed a plea in abatement in state court which was denied.

of Locomotive Engineers, 398 U.S. 281, 90 S. Ct. ___, 26 L.Ed.2d 234 (1970).

Simply because a federal court has taken jurisdiction of a case does not mean that it can enjoin all state proceedings between the same parties over the same issue. Only when one court has exclusive jurisdiction over the *res* in an *in rem* or *quasi in rem* action can concurrent adjudication of state and federal suits be stopped; even in that situation the federal court must have acquired jurisdiction first to warrant the issuance of the injunction. *Penn. General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 55 S. Ct. 386 79 L.Ed. 850 (1935).

The court concludes that the present action is *in personam* and that the court is without jurisdiction to issue the desired injunction. In so concluding the court is primarily persuaded by Sterlings statement of its cause of action filed March 3, 1971, in response to this court's preliminary pretrial order. In that document Sterling requests, in addition to money damages, [430] declarations and orders requiring the transfer of "overriding royalties of one sixty-fourth (1/64) of seven eighths (7/8) of all oil, gas and other minerals" taken from "non-producing leases." Additionally, Sterling requests declarations and orders requiring transfer of interests in producing leases or producing property.

In sum, Sterling is requesting the court to interpret the Sterling agreement and order specific performance of the contract as interpreted. Money damages are requested for injuries already sustained and in lieu

of specific performance if performance is not possible. In this posture there is no necessity of this court having possession of the leases or properties. Sterling has agreed to take money damages as a substitute.

Sterling suggests that even if the action is *in personam* this court is authorized to enjoin the state proceeding to preserve its "unfettered authority to write a final decree," "to protect the right of a person to have a controversy determined by a federal court in a removed action," and "to prevent harassment of a federal litigant through even one state court proceeding." The cases cited by Sterling are clearly distinguishable from the present case, however. Even more important to this issue is the fact that the Fifth Circuit's opinion in the interlocutory appeal allowed the present concurrent litigation to proceed. *Jett v. Zink*, 362 F.2d 723, 730 (5th Cir. 1966).

[431] Sterling's argument can be construed to allege that the case falls within the third exception — to effectuate a judgment of this court. The court cannot adopt this as grounds for issuing the injunction. This court did issue a partial summary judgment on the validity of the Sterling agreement; this decree however did not dispose of the more complex issues of interpretation found in both the state and federal cases. In view of the fact that there has been no allegation that the state court will fail to give that decree whatever res judicata effect it requires, this court is not disposed to enter the requested injunction.

Based on the foregoing, it is ORDERED, ADJUDGED, and DECREED that:

(1) the motion for a preliminary injunction be, and the same hereby is, DENIED; and,

(2) the use of documents, depositions, etc., obtained through federal discovery, is permitted in the state trial subject to the state court's evidentiary rulings, on the condition that it will also be available for use in the federal trial scheduled for July 12, 1971.

Done, this the 28 day of April, 1971.

(Signed) VIRGIL PITTMAN
UNITED STATES DISTRICT JUDGE

EXCERPTS FROM PROCEEDING ON JULY 14, 1971 IN DISTRICT COURT ON MOTION FOR STAY OF FEDERAL ACTIONS

This CAUSE coming on to be heard before THE HONORABLE VIRGIL PITTMAN, UNITED STATES DISTRICT JUDGE, for the SOUTHERN DISTRICT OF ALABAMA, on the 14th day of July, 1971, commencing at approximately 9:30 o'clock P.M.

* * * *

THE COURT:

I don't mean to cut you off. I don't think there is any question but if this case came on to me today and the State Court proceeding had not started, I would

not abstain. I don't think there are such legal questions that I should abstain in lieu of the State Court. And so I would go right ahead. I have been very concerned because of the fact that this case was on the State docket for so long and on this Court's docket for so long and no action was taken by the movants, the petitioners — Mr. Jett and Mr. Chamberlain — to activate the State Court until this Court activated it. Now, the attorneys say if any action had been initiated by Sterling they would have done the same thing to me. That is no answer. There has been for some reason no pressing by any party — Jett and Chamberlain, or Sterling — to really move the litigation. I do not know, and I really don't intend to inquire as to why neither party has pressed or sought to have these issues litigated. [599] I have already stated my reasons, and I am not going to repeat that, of initiating the action and why I was as late as I was in initiating the action. Now, there is one other question I want to ask the Plaintiffs. There has been a lot of late filing of counter claims and amendments — extremely late — I have permitted them and let them come in. Of course nobody knows how the State Court action is going. In a sense you have won more than half of the battle. You have won the first big battle in State Court, because if they had won that battle, you would be gone; you would be out of it. Without going into the facts and how the facts will determine the rest of the thing it seems the other big point as to whether or not the disclaimer is a release of all of it — and I have given you my views; that it would not be — that most of it would be Pro Tanto. So — but the factual situation may change that. But as a principal of law it looks to me that the law is pretty clear that the most it

could be would be Pro Tanto. Now, because for some unknown reason this thing has moved so [600] slowly I am unwilling for this case to continue at this snail's pace in the future. So what — and by the history of the case I would not be surprised that if judgments went against the Plaintiffs in the State Court — Jett and Chamberlain — and then the question of whether it's Res Judicata which would be favorable to you at that stage, to seek some omitment and bring in some issues and to try to create somthing to keep it from being Res Judicata. Now, gentlemen, I want a statement from you as to whether or not there are to be any amendments or trying to change the cause of action to keep it from being Res Judicata in that Court down there, because really the thrust of your stay depends on whether or not that case will be Res Judicata or not.

MR. LYONS:

Is Your Honor concerned with subsequent efforts to inject new issues?

THE COURT:

Yes. I certainly am. So that the Court can litigate issues that you have failed — in the event [601] you failed to carry your day in the State Court.

MR. ODOM:

Not from our point.

MR. LYONS:

Not from Cornwall.

MR. PIPES:
Not from Pack and Kahn.

THE COURT:
Is that right, Mr. Chamberlain?

MR. CHAMBERLAIN:
That is correct, sir.

THE COURT:
Now, is there anybody who speaks for Mr. Jett?

MR. MATRANGA:
Yes. I represent him.

THE COURT:
Is Mr. Jett here?

MR. MATRANGA:
He is sitting in the Courthouse.

MR. PARKMAN:
Judge, if we should suffer an adverse final judgment in State Court, of course, we do not wish to be understood that we would not appeal that [602] judgment to the Supreme Court of Alabama.

THE COURT:
I am not saying you won't appeal it, but it's my understanding that your position has been that it's Res Judicata once the Circuit Court has rendered a judgment as far as this Court is concerned. Is that right?

MR. PARKMAN:
Yes, sir.

MR. ODOM:
Your Honor, we have no intentions of any counterclaim —

THE COURT:
Any amendments; inject new —

MR. ODOM:
It's our position we want to try this case in the State Court and we are going to do it expeditiously.

MR. MATRANGA:
Perhaps you want to hear Mr. Jett say this, but it's our position, in Mr. Jett's presence, that we would recognize the Res Judicata and the issues to be resolved in the State Court if the [603] matters are allowed to be tried in State Court, and that we will inject no new issues that would be contrary to that decision in State Court.

THE COURT:
Is that right, Mr. Jett?

MR. JETT:
That is correct, sir.

MR. DARBY:
Your Honor, I think perhaps they already have issues in the State Court, or are trying raise them — I don't know whether they do or not — I don't know if they'll have any success with it because I don't think

factually they can sustain it. But there were statements made in the negotiations of settlement yesterday. We were told —

THE COURT:
Just a minute, Mr. Darby, they have just bound themselves that no new issues are to be raised that are not already before the Court. And I suspect that to be binding.

MR. REAMS:
We are talking about this case, of course, in the [604] Federal Court.

THE COURT:
Alright. Let's go a step further. Are you going to raise issues in the State Court that will distinguish this case from that one so it will not be Res Judicata?

MR. CHAMBERLAIN:
No, sir. Not that.

THE COURT:
Nor from Mr. Jett?

MR. JETT:
That is correct.

MR. ODOM:
We don't intend to waive any issues that are in the State Court.

THE COURT:
I mean so far as the pleadings now on file and presented to this Court.

MR. ODOM:
Absolutely.

MR. LYONS:
We will not be a party to any devious schemes.

[605] THE COURT:
Devious or otherwise; modified schemes. What I am doing, gentlemen, is trying to tie this down, and this is as slippery as an eel and like a can of worms. I recognize that law suits are adversary proceedings and that attorneys are going to do everything that is honorable to prevail. And I would expect them to. If I was practicing law I would do the same thing. But we all have some experience in Court proceedings, and we have some experience of when you lose one way you try to come back another way. And it would be unconscionable to me to grant a stay today and then let the thing, particularly so far as the moving parties are concerned with reference to the stay, to come back and if they suffer a defeat in the State Court say, well now, new things have come up, Your Honor, and we want to remand and it's now not Res Judicata. That would be an unconscionable position to take and this Court only wants this litigation settled in a Court of law. I have no particular interest as to whether it's settled in the State Court [606] or Federal Court. But it is old — it is too old — and again I come back that not one of the interested parties have taken any initiative to get this case tried. And the Court did it on its

own motion, feeling that it has — in the public interest, litigation should be moved along.

MR. DARBY:

Your Honor, may I say something? You had some question about what day you announced that this case was going to be tried. I made a notation of it. I think it was February 5th.

THE COURT:

I think their brief mentioned a time in February.

MR. DARBY:

And they made no effort whatsoever to proceed in a State Court until the day of Your Honor's —

THE COURT:

That is what has disturbed me.

MR. DARBY:

What in substance they are doing to me, and perhaps doing to the jurisdiction of the Federal Court, [607] depending on how Your Honor rules, you set aside enough time to prepare this case and you give us that

time, because you thought we needed it. You gave us the time to try it. They — then, after you had had your pre-trial — not before — after — they could have gone down to the State Court before then. Your pre-trial, I think, was April 5th. It was about a month after. The next day they go down to the State Court and get the State action set. Now, we had this action set. Their action was filed about three or four months before —

THE COURT:

Mr. Darby, I might say this; I recall no positive action that you took to this Court to get your case tried.

MR. DARBY:

I didn't ask your Honor to set it. There were motions on file. Quite a number had not been ruled upon. I figured Your Honor would rule on those motions in due time, and we were still in the process of taking discovery. We —

[608] THE COURT:

Well, if discovery is not completed since 1963. . .

MR. DARBY:

No, sir. I am not saying — we still have some discovery motions that I don't think Your Honor has ruled on until this day.

THE COURT:

I have interrogatories, and that's the only thing that I know of. And they were filed — and I forget who filed them — but they were filed so that the answers couldn't have been gotten in time.

MR. DARBY:

We answered the same interrogatories in the State Court, and they are in the process of being typed. We are not even objecting to them.

THE COURT:

Well, I frankly was not in too much sympathy with whoever proposed them, because if I had given you the full length of time to answer them it would have been past the trial date, and I think that that is not in the spirit of discovery being completed by the — and I say that, without [609] recalling who filed them.

MR. PARKMAN:

Judge, if I may, it was the third party Defendant who has just been allowed into the litigation.

MR. DARBY:

But we think that the removal statute does mean something. I think it is pretty clear who caused the second complaint to be filed in the State Court, and I think it is fairly clear as to why it was filed.

THE COURT:

I think all the attorneys on both sides have made every maneuver they can to try this case in the forum they wanted to try it in. And they have tried to defeat the other side; one from putting it in the forum they wanted it in, and there is no question of it and there is no question — and I take no umpirage that they moved it to try it in State Court. The only thing that I have disliked about it is that the movement was made after this court allotted in effect two months of it's

time in preventing me — with the docket that we have. Of course, I can put other [610] things in, but a substantial part of this time of two months that I've set aside for the handling of this — at that time it was all non-jury, and I anticipated having to write finding of facts and questions of law. And it's complicated. I don't know if I could have finished in two months time. But it has hampered this Court in the efficient use of its time that these developments have taken place. But I must also point out that not just them, but for some unknown reason no initiative was taken by the other side to get the case tried. So I think that we can pass out laurels and blame in equal portions to every body. Is there anything else anybody wants to say?

MR. DARBY:

I would submit your case was set first. It was announced in February, and what has occurred since that time at the instance of one of the parties shouldn't affect the trial of this case in this Court

THE COURT:

Well, I must say this; for them to take six days [611] on direct and you to take eighteen days on cross examination, I am not sure there wasn't some element of trying to carry the case so that it couldn't be completed and tried over here.

MR. DARBY:

Your Honor, the Court listened to the cross examination. The Court gave some time limits and the Court extended the time limits and I am sure the only reason the Court extended the time limits is because we were

producing information that was valuable to the Court. And I think the Court's decision shows that is what we did.

THE COURT:

Well, I am not going to criticize anybody about the way they handle a case. But I'd say that I think there has been about as much maneuvering in this case as there could be for the respective parties to adjudicate the case in the particular forums that they want it. I see nothing that is unethical in it. I must frankly say that I frown on the late development. If the initiative had been taken before this Court set it's thing then — and for that reason I have been [612] concerned about whether or not how fast the case is going down there and when it's going to be concluded. Now, in talking to Judge Robertson it is his judgment that he can finish the case in two weeks and render a decree immediately. And so I went a little further than that, and if I recall the conversation correctly, I said, Judge, — I believe he is to start the 26th, is that right?

MR. REAMS:

That is our understanding.

THE COURT:

I said, Judge, do you think by the outside you will have finished and can render a decree by the 15th of August — which is maybe an additional week — and he expressed that so far as what he knew about the case at that time — and I guess if he spent six weeks on it he knows a lot about it — that he doesn't have any real fear. Now, gentlemen, I am going to release this jury; declare a mistrial. I am going to let you go ahead and proceed down there. If for some unknown

reason, and without charging bad faith [613] to anyone, if that litigation is not concluded more or less along the schedule that is now set up I may very well set this case again the last part of November, and not later than January. And gentlemen, don't come back and say that you are pending in the State Court, because by that time you will have had a year, liking one month from the time this Court made its announcement, and so — and regardless of how that case goes down there I expect to hold this case as Res Judicata and dismiss it from the docket.

MR. DARBY:

Your Honor, what will you do if the Judge Robertson rules for one side or the other and the Alabama Supreme Court reverses it? Then we are going to be back just where we are.

THE COURT:

Then you can re-try it in the State Court down there — and there is authority that I can hold it Res Judicata. I understand the authority is split as to whether it is Res Judicata, but I am not going to wait for a year or two years — and [614] it has been known to go for three years through the Appellate Court processes. And so litigate it in the State Court. But I want it clear, gentlemen, that I think that I will be within my discretion that unless there is a final decree reasonably soon in this case, and since you have been put on notice that you can make your plans now to begin maybe the latter part of November, and certainly in January. I will try to give you at least six weeks notice. So, all I can say is be on your toes and finish that litigation. If not, then I take it for some unknown reason the mechanics of the State Court are not moving,

and that I don't know when it would be finished, and I would move it along in this Court. Alright, gentlemen.

ORDER

(Number and Title Omitted)

You are advised that on the 14 day of July, 1971, the following action was taken in the above-entitled case by Judge PITTMAN:

Motion to Stay filed on July 12, 1971, by Bart B. Chamberlain, Jr., G. H. Jett, Geo. H. Jett Drilling Co., Inc., Howard M. Pack, Joseph Kahn, The Equity Corporation, Cornwall Trading Corporation, Four States Drilling Co., Inc., James E. Kemp, Kemp Oil Co., Inc., and Big Four Oil Co., Inc., is hereby GRANTED.

WILLIAM J. O'CONNOR
CLERK,
(Signed) JOHN O'BRIEN
Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

ANCORA CORPORATION, ET AL.

versus CA-No. 4033-66-P

JOHN E. STEIN, ETC., ET AL.

EXCERPT FROM ORDER ENTERED
NOVEMBER 15, 1971.

Most of the attorneys in these cases are also attorneys in the Jett and Chamberlain v. Zink, et al. cases, Civil Action Nos. 3010-63 and 3192-63. Those cases were filed in 1963. The court incorporates, and makes part of the records in these cases, its conferences concerning the dilatory action in those cases. There were cases pending in the Mobile Circuit Court of Alabama which had been filed shortly after the cases were filed in Federal court. The cases were complex and the expected trial time was one month or more. Because of these factors, the court gave several months advance notice of its setting the cases for trial. After this court's announced trial date, the attorneys in those cases for plaintiff Chamberlain secured an earlier trial setting in the state court and began the taking of testimony prior to the setting in this court. Therefore, when the cases were called for trial in this court, it was necessary to stay the action here pending the outcome in the state court. In order to insure that the cases in the state court would proceed to a conclusion, this court advised the parties that unless the cases were concluded within a given period of time, this court

would proceed with the trial of the cases in this court. The deadlines have not been met in the state court, although I have been informed that a judgment is expected in the near future and before the first of December. Several of the same attorneys for Chamberlain in the concurrent cases in the state court are attorneys [934] for Chamberlain and movants herein to add and drop parties. The purpose of these observations is to show the maneuvering and scurrying around with reference to the trial of those old cases to select their forum whereas no action had been taken to bring the cases to trial in the state court prior to the announced trial date in this court. This also indicates the difficulty the court is experiencing in bringing the cases sub judice to trial.

* * * *

ORDER GRANTING
SUMMARY JUDGMENT

(Number and Title Omitted)

Filed: Jan. 27, 1972

This cause having come on to be heard in open court on the 10th day of December, 1971, on the motion for summary judgment heretofore filed by G. H. Jett and Bart B. Chamberlain, Jr. on December 2, 1971; and on January 21, 1972, the motion of Cornwall Trading Corporation; the Equity Corporation and Richard E. Peck as successor Trustee for the Equity Corporation filed December 9, 1971, and the motion of Howard M.

Pack and Joseph Kahn filed December 6, 1971, and on the various motions of any other parties hereto joining in the aforementioned motion for summary judgment and, pursuant to Rule 56 of the Federal Rules of Civil Procedure, the [920] court having examined the pleadings, evidence and other matters before it on the aforesaid motions and after oral argument and the submission of briefs by counsel for the parties hereto:

FINDINGS OF FACT

1. The basis of the litigation in these causes, and the basis of the litigation in that certain lawsuit styled *Howard M. Pack, et al. vs. Albert Barnes Zink, etc., et al.*, Case No. 60,357, Circuit Court of Mobile County, Alabama, in Equity (herein called the "Pack-Kahn Action") are the same.

2. All of the parties to these causes are also parties in the Pack-Kahn Action.

3. All of the issues involved in these causes are also involved in or are within the scope of the issues in the Pack-Kahn Action.

4. By final decrees of November 4, 1971 and November 29, 1971, entered in the Pack-Kahn Action, the Circuit Court of Mobile County, Alabama, entered a money judgment in favor of Sterling Oil of Oklahoma, Inc. and its individual trustees.

CONCLUSION OF LAW

1. The aforesaid final decrees of the Circuit Court of Mobile County, Alabama, dated November 4, 1971 and November 29, 1971 entered in the Pack-Kahn Action, constitutes a final judgment in that cause which (a) disposes of the rights and liabilities of the parties and is determinative of the issues and matters involved in these causes; (b) is binding and conclusive on the [921] parties to these causes; and (c) is therefore *res judicata* and operates as a bar to any further proceedings herein.

Based upon a consideration of the foregoing facts and conclusions of law, the court is of the opinion that G. H. Jett and Bart B. Chamberlain, Jr. and the other parties who have filed the various motions for summary judgment are entitled to the relief prayed for therein as a matter of law, and

It is therefore ORDERED, ADJUDGED and DECREED that the said motions be, and the same hereby are, GRANTED.

Done, at Mobile, Alabama, this the 27 day of January, 1972.

VIRGIL PITTMAN
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21282

GEORGE H. JETT, ET AL.,
Appellants,

versus

ALBERT BARNES ZINK, ET AL.,
Appellees.

No. 21283

HOWARD M. PACK, ET AL.,
Appellants,

versus

ALBERT BARNES ZINK, ETC., ET AL.,
Appellees.

Appeals from the United States District Court for the Southern District of Alabama.

(June 23, 1966.)

Before WOODBURY,* WISDOM and BELL, Circuit Judges.

WOODBURY, Senior Circuit Judge: This convoluted litigation began with a suit in the Circuit Court of Mobile County, Alabama, for a declaratory judgment as to the validity, and if valid the meaning, of a contract referred to by the parties and hereinafter as the Sterling Agreement. The plaintiffs were Bart B. Chamberlain, Jr., a citizen of Alabama, and G. H. Jett, a citizen of Louisiana. The defendants were Sterling Oil of Oklahoma, Inc., a Delaware corporation having its

*Senior Judge of the First Circuit, sitting by designation.

principal place of business in Oklahoma, and Albert B. Zink, a citizen of Pennsylvania, and Herbert C. Smyth, a citizen of New York, both as individual trustees of Sterling. There being complete diversity of citizenship of the parties and clearly an adequate amount in controversy, the suit was removed to the United States District Court for the Southern District of Alabama.

At this juncture Howard M. Pack and Joseph Kahn, both citizens of New York, and Geo. H. Jett Drilling Co., a Delaware corporation, with the consent of Chamberlain and Jett, moved for leave to intervene as indispensable parties plaintiff, and Chamberlain and Jett moved for an order making Cornwall Trading Corporation, a Delaware corporation, and Four States Drilling Company, Inc., a Texas corporation, involuntary parties plaintiff. In anticipation of the granting of the motions for leave to intervene and the motion to add involuntary parties plaintiff, Chamberlain and Jett moved to remand to the state court on the ground that with the entrance into the litigation of indispensable parties plaintiff complete diversity of the citizenship of the parties would no longer exist.

While these motions were under submission in the court below, Pack, Kahn and Geo. H. Jett Drilling Co. brought suit in the Circuit Court of Mobile County, Alabama, against Zink, Smyth, Sterling Oil, Jett, Chamberlain, Cornwall, Four States and others who need not be mentioned for the same relief as that sought in the earlier suit described hereinabove. Zink, Smyth and Sterling removed this suit to the court below alleging fraudulent joinder of parties and the existence of

a separable controversy between them and Jett and Chamberlain. Pack, Kahn and Geo. H. Jett Drilling Co. moved to remand the suit to the state court from whence it came.

The court below without opinion denied all the motions listed above. Pack, Kahn and Geo. H. Jett Drilling Co. appealed from the denial of their motions for leave to intervene and Jett and Chamberlain appealed from the denial of their motions to add parties plaintiff and to remand. This appeal is No. 21,282 on our docket. Pack, Kahn and Geo. H. Jett Drilling Co. appealed from the denial of their motion to remand. This appeal is No. 21,283 on our docket. Both appeals are properly before this court under the provisions of Title 28 U.S.C. § 1292(b).

Originally there was complete diversity of citizenship between plaintiffs and defendants. Neither Jett nor Chamberlain was a resident of Pennsylvania, as was the defendant Zink, or of New York, as was the defendant Smyth, or of Delaware, where the defendant Sterling was incorporated, or of Oklahoma, where it had its principal place of business. With the case in that posture and the jurisdictional amount in controversy, removal was routine. However, should the proposed parties plaintiff be admitted, there would no longer be complete diversity of citizenship of the parties, for Cornwall and Jett Drilling are both Delaware corporations, as is the defendant Sterling, and Pack and Kahn are both citizens of New York, as is the defendant Smyth.

The appellees in No. 21,282 contend that the right to remove depends upon the case disclosed by the pleadings when the petition for removal is filed and that the subsequent addition of new parties is not to be considered on a motion to remand. The cases they cite in support of this proposition are not in point. On the contrary the law is clearly settled that in diversity cases the question of indispensable parties is inherent in the issue of federal jurisdiction and that indispensable parties must be joined, *sua sponte* by the court if need be, even though to do so destroys complete diversity of citizenship of the parties and ousts federal courts of jurisdiction under the rule of *Strawbridge v. Curtis*, 3 Cranch 267 (1806). *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U.S. 77 (1920); *The Baltimore and Ohio Railroad v. The City of Parkersburg*, 268 U.S. 35, 38 (1925); *Calcote v. Texas Pac. Coal & Oil Co.*, 157 F.2d 216, 218, 219 (C.A. 5, 1946), *cert. denied*, 329 U.S. 782 (1946), *rehearing denied*, 329 U.S. 830 (1946).

The question then in No. 21,282 is whether the parties who sought to intervene, or who the original plaintiffs sought to have made involuntary plaintiffs, were so indispensable to the litigation that no court should proceed to final decision without them, that is to say, "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields v. Barrow*, 17 Howard 129, 139 (1854), cited with approval in *Waterman v. Canal-Louisiana Bank Co.*, 215 U.S. 33, 48 (1909), and *Niles-Bement-Pond Co. v. Iron Moulders Union, supra*

80. And see *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 456 (1922), in which the Court said: "The relation of indispensable parties to the suit must be such that no decree can be entered in the case which will do justice to the parties before the court without injuriously affecting the rights of absent parties."

We must, therefore, determine the nature of the interest in the litigation of any one of the persons or corporations whose presence in the suit would destroy complete diversity of citizenship of the parties. The nature of an interest in litigation depends upon the law of the state concerned, in this case Alabama, for: "In a diversity case, state substantive law will govern in determining the rights and interests of all concerned. After those rights and interests have been ascertained by state law, a federal court will determine indispensability of a party according to its own rules, taking into consideration whether justice can be done and complete relief afforded. This will depend, of course, on the substantive rights created by the state." *Hertz v. Record Publishing Co. of Erie*, 219 F.2d 397, 399, 400 (C.A. 3, 1955), *cert. denied* 349 U.S. 912 (1955). See also, 3 Moore, Federal Practice, ¶ 19.07. So much for the present for the law; we turn now to the facts as disclosed by the pleadings.

This litigation grew out of the purchase as of May 1, 1959, by Jett and Chamberlain from Gulf Oil Corporation of all of its producing and non-producing leases in, near or related to the Citronelle Oil Field in Mobile County, Alabama, and their simultaneous purchase from Gulf Refining Company of the Citronelle-Mobile Gathering System. The purchase was fi-

nanced in part by the reservation by Gulf Oil of a production payment and in part by loans from a New York bank secured by mortgages on the properties. Further financing was obtained by a loan from The Equity Corporation secured by a mortgage junior to those given to the New York bank which was guaranteed in part by Pack, Kahn and Cornwall in return for which they were given an interest in the properties.

As of the date of purchase, May 1, 1959, Jett and Chamberlain entered into the Sterling Agreement with Sterling Oil of Oklahoma, Inc. This is a long and complicated document. No useful purpose would be served by analysing it in detail. It will suffice to say that by the terms of the agreement the parties cancelled, annulled and terminated all agreements of every sort and kind previously made and entered into between them, that Sterling transferred to Jett and Chamberlain all of its rights, interests, claims and demands of every kind, character and description in return for which Jett and Chamberlain agreed to grant, transfer and convey to Zink as individual trustee for Sterling certain "overriding royalties" and other interests in the properties upon the occurrence of four events: (a) when the production payment carved out and reserved by Gulf Oil, which it had assigned to Olympic Oil and Gas Corporation, shall have been fully paid and satisfied; (b) when the production loan shall have been fully paid and satisfied; (c) when $500,000 of the amount borrowed from The Equity Corporation which Jett and Chamberlain had applied to the purchase of producing leases from Gulf Oil shall have been repaid, and (d) when Jett and Chamberlain shall have recovered all legal fees, printing costs and other expenses

incurred by them in connection with the financing referred to above.

As of the same date, May 1, 1959, Jett, Chamberlain, Cornwall (which apparently is the successor in interest of The Equity Corporation), Pack and Kahn entered into a supplemental agreement, so called. This agreement recites that by a concurrent conveyance Cornwall had acquired an undivided 23% interest in the gathering system purchased by Jett and Chamberlain from Gulf Refining Co. and that Pack and Kahn together had acquired an undivided 5.75% interest in the system, that Cornwall by concurrent assignment of interest had acquired an undivided 20% interest in deep rights in the producing leases and Pack and Kahn together had acquired an undivided 5% interest in those leases, and it recites that under the Sterling Agreement Jett and Chamberlain had agreed upon the happening of certain events to convey to Sterling Oil's trustee, Zink, (i) an overriding royalty in each producing lease equal in value to 25% of a working interest in the lease, (ii) "certain percentages" of the gross profits of the gathering system, and (iii) an overriding royalty of 1/64 of 7/8 on each non-producing lease. The supplemental agreement then goes on to provide that Cornwall, Pack and Kahn "confirm" that their interests in the gathering system are "subject" to their proportionate share of the obligations to pay the "percentages of gross profits" of the gathering system to Sterling Oil, referred to in (ii) above, and that when the time comes for Jett and Chamberlain to convey to Sterling Oil the overriding royalty interest provided in the Sterling Agreement they will take "appropriate action" and deliver such documents as may be necessary "to

subject" their interests to the overriding royalties referred to in (i) and (iii) above, "if" Jett and Chamberlain shall concurrently convey to them (Cornwall, Pack and Kahn), without cost, "additional working interest" in each lease in which they have already acquired an interest in the amount which, when added to their present interest, will be equal to their present interests free of the burden of the overriding royalty granted to Sterling Oil Company under the Sterling Agreement.

The complaint alleges that after the purchase of the properties, production from the wells fell off to such an extent that it would have been impossible for Jett and Chamberlain to have made payments on the loans as payments fell due and that only because of the expenditure by Jett, Chamberlain, Cornwall, Pack and Kahn of $1,700,000 for reworking the wells was foreclosure of the mortgages on the properties avoided. And it is alleged in the complaint that reworking the wells so substantially increased oil production that if the complainants are allowed to recover the expense of reworking, plus interest, the net income of oil runs will be so great that the date of the transfer of overriding royalties to Sterling Oil under the Sterling Agreement will not be postponed beyond the date when the transfer would have taken place without the wells having been reworked and that, as of the date of transfer, the value of Sterling Oil's overriding royalty interest will be substantially greater than it would have been had the wells not been reworked.

So much for the present for Cornwall, Pack and Kahn. We turn now to the remaining allegedly indispensable parties.

Neither Geo. H. Jett Drilling Co., the Delaware corporation, nor Four States Drilling Company, Inc., the Texas corporation, is mentioned in the complaint. In its petition for leave to intervene as a party plaintiff, Geo. H. Jett Drilling Co. alleges that Jett and Chamberlain assigned all of their right, title and interest in approximately 975 leasehold acres from the non-producing leases they had acquired from Gulf Oil to Jett Drilling Co., Inc., another and apparently a separate corporation, and that Jett Drilling Co., Inc., assigned all of its right, title and interest in "a portion" of the 975 leasehold acres to Geo. H. Jett Drilling Co., the petitioner for leave to intervene, which it in turn had assigned to another corporation reserving to itself and its successors and assigns an overriding royalty interest "equal to or larger" than the 1/64 of 7/8 to be conveyed to Sterling Oil under the Sterling Agreement which, it is alleged, will "come out of and be deducted from the overriding royalty interest reserved" by the petitioner, Geo. H. Jett Drilling Co.

Jett's and Chamberlain's motion to add Cornwall and Four States Drilling Co., Inc., as parties plaintiff alleges, insofar as Four States is concerned, that it was "formerly Jett Drilling Co., Inc.," and that under assignments of "various portions" of the 975 leasehold acres other than those assigned to Geo. H. Jett Drilling Co. it had excepted and reserved an overriding royalty interest similar to that reserved by Jett Drill-

ing Co. in the assignments it had made of other portions of the leasehold acreage.

The relief requested by Jett and Chamberlain in their complaint is twofold. First they ask that the Sterling Agreement be declared null and void for the reason that Sterling Oil was not qualified to do business in Alabama when the Agreement was entered into[1] and as alternative relief they ask for a construction of the Sterling Agreement favorable to their interest. Specifically, they first ask for a valuation of the undivided percentage interests conveyed to Cornwall, Pack and Kahn and a declaration that the conveyance of those interests to them constituted an expense or cost incurred by the complainants (Jett and Chamberlain) in connection with the creation of equity financing referred to in the Sterling Agreement. Then they ask for a declaration that they and Pack, Kahn and Cornwall be allowed to recover the $1,700,000 spent for reworking the wells out of the net income of the oil runs prior to the time of transfer of the overriding royalty to Sterling Oil's trustee under the Sterling Agreement.

The long and short of the matter is that whatever rights the allegedly indispensable parties may have are "subject" to the rights of Sterling Oil. Thus, naturally, they, like the original plaintiffs, would like to

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[1]The Sterling Agreement was effective May 1, 1959, but it was not executed by the parties until after that date. Sterling Oil executed it in New York on May 26, 1959, Zink executed it in Pennsylvania on May 27, 1959, Sterling Oil qualified to do business in Alabama on August 6, 1959, and Chamberlain and Jett executed it in Alabama and Louisiana on August 17 and 18, 1959, respectively.

remove Sterling Oil from the scene by having the Sterling Agreement declared null and void and, failing that, to have the Agreement construed to their advantage. But this is not enough to make them indispensable parties. Their interests must be of such a nature that justice cannot be accorded the original parties before the court without injuriously affecting their rights.

Measured by this test the interests of those who would join or be joined as plaintiffs are not such as to make them indispensable parties. Should a decree be entered adverse to Jett and Chamberlain either as to the validity of the Sterling Agreement or as to its meaning, the rights of the absent parties would still be subject to the rights of Sterling Oil under the Sterling Agreement as the absent parties with knowledge of the Sterling Agreement agreed that they should be. Their rights would not be injuriously affected. On the other hand, should a decree be eventually entered in favor of Jett and Chamberlain on either issue the absent parties would stand to gain at least by a precedent. We do not see how, win, lose or draw, the rights of the absent parties could be injuriously affected by any decree that might be entered in the case. The rulings on the motions in No. 21,282 are affirmed.

We turn now to No. 21,283.

The case before us on this appeal involves the same parties, and others, and the same subject matter. But it presents a separate problem for consideration because the question now before us is not whether parties are indispensable but whether there has been a joinder of improper parties to defeat federal jurisdiction.

To recapitulate and amplify, the case now before us was not removable on the face of the complaint because complete diversity of citizenship of the parties did not there appear. The plaintiffs Pack and Kahn were citizens of New York and the plaintiff Geo. H. Jett Drilling Co. was for jurisdictional purposes a citizen of Delaware,[2] and the defendant Smyth is a citizen of New York, as are the plaintiffs Pack and Kahn, and the defendant Sterling Oil is a citizen of Delaware as is the plaintiff Geo. H. Jett Drilling Co. Zink, Smyth and Sterling Oil removed the case to the court below alleging that when properly realigned the only necessary parties plaintiff will be Jett and Chamberlain and the only necessary parties defendant will be themselves, Zink, Smyth and Sterling Oil, that all other named parties are merely nominal parties, and that a separable controversy exists between them and Jett and Chamberlain. Wherefore they assert that the action is one within the original jurisdiction of the United States District Courts under Title 28 U.S.C. § 1332(a)(1). The court below denied the motion of Pack, Kahn and Geo. H. Jett Drilling Co. to remand and it is their appeal that is presently under consideration.

The appellees, Zink, Smyth and Sterling Oil, contend that Jett, Chamberlain, Pack, Kahn and Geo. H. Jett Drilling Co. have attempted to deprive them of their federally created right to have the suit tried in a federal court by fraudulently and in bad faith joining other parties in order to defeat removal. They argue that this is conclusively established by the filing of

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[2]The location of its principal place of business is not alleged.

the second or Pack-Kahn suit while motions for leave to intervene, to add parties plaintiff and to remand in the earlier or Jett-Chamberlain suit were under submission in the court below. And they say that this is clearly established by the fact that Jett, Chamberlain, Pack, Kahn and Geo. H. Jett Drilling Co. are all represented by the same counsel. We do not agree.

It is horn book law that fraud is never presumed but must be established by clear and persuasive evidence. Moreover, there was good reason for bringing the second suit in order to assure the plaintiffs therein a day in court in the event that they were not admitted as parties plaintiff in the earlier suit, as indeed they were not. The question is whether they have stated a cause of action against any of the defendants whose presence in the litigation would destroy complete diversity of citizenship of the parties. We think they have.

As we have already pointed out, the rights acquired in the properties by Pack, Kahn and Geo. H. Jett Drilling Co., and the same may be said of the rights of Cornwall which probably should be realigned as a plaintiff, are "subject" to the rights acquired by Sterling Oil under the Sterling Agreement. Thus they have an obvious interest in the validity of the Sterling Agreement and in an interpretation of it to their advantage This brings them within the provisions of the declaratory judgment law of Alabama, Code of Alabama of 1940, Title 7, § 157 (1958), which so far as here material reads: "Any person interested under a . . . written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affect-

ed by a ... contract ..., may have determined any question of construction or validity arising under the ... contract ... and obtain a declaration of rights, status, or other legal relations thereunder."

But Sterling Oil insists that it has no quarrel with Pack, Kahn, Cornwall and Jett Drilling but only with Jett and Chamberlain and to remove any possibility of doubt as to this, Sterling Oil and its trustees, Zink and Smyth, a month before hearing in this court, filed a disclaimer of any right of action against Pack, Kahn, Cornwall and Jett Drilling arising out of the allegations in either complaint. This disclaimer is of no moment. It is not for defendants to shape plaintiffs' cases. No doubt most defendants would like to escape trial and possible liability by disclaiming any right of action against a plaintiff. That is not the point. The question is whether a plaintiff has stated a cause of action against a defendant. And that these plaintiffs have done as appears hereinbefore.

The question remains whether this case, No. 21,283, falls within the scope of Title 28 U.S.C. § 1441(c) which provides:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

In *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 14 (1951), the Court said that under § 1441(c), introduced into the Code in 1948, a separable controversy is no longer an adequate ground for removal unless it also constitutes "a separate and independent cause of action." And it said at page 14 that ". . . where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)." It is the joinder of claims, not the joinder of parties, that makes § 1441(c) applicable. See 1A Moore's Federal Practice ¶ 0.163[4-5]. And here all plaintiffs including those who would be plaintiffs upon realignment of parties according to interest, assert the same claim, *i.e.*, that the Sterling Agreement is invalid and, in the alternative, if valid, should be construed in a way favorable to their interest. There simply are not "separate and independent claim or causes of action" alleged. The case must be remanded to the court from whence it came.

The result is unfortunate in that it leaves the same issues pending simultaneously in a state and federal court but we see no escape from our conclusion. The parties here brought it upon themselves in their battle over the forum in which to try their case.

No. 21,282 is affirmed. No. 21,283 is reversed.

APPENDIX C

IN THE CIRCUIT COURT
MOBILE COUNTY, ALABAMA

PACK, ET AL.

versus Case No. 60,357
In Equity

STERLING, ET AL.

MOTION

Comes now the Respondent and Cross-Complainant, Bart B. Chamberlain, Jr., and respectfully moves the court as follows:

(a) To set for Friday, March 12, 1971, the argument on demurrers which were filed on July 2, 1968 to the Pleas in Abatement which were filed on May 3, 1968 by the Respondents and Cross-Respondents James, Smyth and Sterling.

(b) To set this cause down for trial on the merits on May 3, 1971, unless its order shall be one over-ruling demurrers to the Plea in Abatement, and to order that on or before April 15, 1971, all parties file their answers, demurrers and other pleadings, each party to incorporate all his or its pleadings in a single document.

As grounds for this motion, movant respectfully shows that this action was commenced in this court on July 5, 1963; that on or about August 5, 1963, on

the petition of Zink, Smyth, and Sterling, it was removed to the United States District Court for the Southern District of Alabama; that on or about January 6, 1964 the United States District Court denied the motion of the complainants to remand the cause to this court, but found that its order involved a controlling question of law as to which there was a substantial ground for difference of opinion, whereupon the complainants appealed to the Fifth Circuit Court of Appeals, and on, to-wit, June 23, 1966, the United States Circuit Court of Appeals for the Fifth Circuit entered its order reversing the order of the U. S. District Court and ordered the cause remanded to the state court.

Thereafter the Respondents and Cross-respondents, Zink, Smyth and Sterling, applied for certiorari to the United States Supreme Court, where certiorari was denied on December 12, 1966.

Subsequently, and on January 24, 1967 this cause was remanded from the U.S. District Court to this court in compliance with the mandate of the U. S. Fifth Circuit Court of Appeals, but subsequently and after the movant had filed his cross-bill of complaint herein, the Respondents and Cross-respondents, Zink, Smyth, and Sterling, again removed this cause to the U. S. District Court and not until March 15, 1968 was this cause finally remanded to this court.

Thus by successive removals and other dilatory actions the Respondents and Cross respondents, Zink, Smyth and Sterling, have delayed a final disposition of this case for almost five (5) years. (August 5, 1963 — March 15, 1968).

The Respondent and Cross-complainant offers to consent to the entering of an order by this court, at the same time when it rules on the demurrer to the Pleas in Abatement, authorizing the use in evidence on the trial of this cause, of all evidence, documentary and otherwise, produced or obtained by any party in cases No. 3010-63 and 3192-63 on the docket of the U. S. District Court for the Southern District of Alabama, to the same extent that the same would be admissible in evidence if obtained through discovery in this court, free of objection on the ground that the discovery through which such evidence was obtained was not had in this cause and in this court.

Movant respectfully shows unto the court that extensive discovery has been conducted in referenced causes in the U. S. District Court over a period of a number of years.

Respectfully submitted,

(Signed) DEWITT REAMS
Dewitt Reams
(Signed) JAMES D. BROOKS
James D. Brooks
Solicitors for Bart B. Chamberlain, Jr.
Respondent and Cross-Complainant

OF COUNSEL:
Pillans, Reams, Tappan, Wood & Roberts
510 Van Antwerp Bldg.
Mobile, Ala.

We, the undersigned, as counsel of record for the respective parties represented by us, hereby accept service of the above and foregoing motion and waive all further service and notice of the hearing of same.

(Signed) SAM W. PIPES III
Sam W. Pipes, III, counsel of record for complainants Howard M. Pack and Joseph Kahn

(Signed) JOSEPH M. MATRANGA
Joseph M. Matranga, counsel of record for Geo. H. Jett Drilling Co., Inc. and G. H. Jett

(Signed) C. A. L. JOHNSTONE, JR.
C. A. L. Johnstone, Jr., counsel of record for Four States Drilling Co., Inc., James E. Kemp and Kemp Oil Company.

APPENDIX D

SUMMARY OF TESTIMONY OF PACK, KAHN AND JETT PERTAINING TO THEIR PARTICIPATION IN THE LITIGATION

According to their own testimony neither Pack, Kahn nor Jett knew anything of or participated in the decision to intervene in the Jett-Chamberlain Action or to bring the Pack-Kahn Action in the state court.

Kahn had never communicated or corresponded with any member of the firm of Hamilton, Denniston, Butler and Riddick, the firm that filed the Pack-Kahn Action. (R. 421-2, 426.) Kahn had no specific recollection of any conversation with Chamberlain with respect to Kahn "becoming a party to a lawsuit." (R. 426.) Kahn found that he had become a party to a lawsuit from Chamberlain, but Kahn has no recollection when Chamberlain told Kahn. (R. 426.) Neither Zink, Smyth nor Sterling Oil has ever made any claim upon Kahn for money or against any property of Pack or Kahn. (R. 427-8.) If Kahn has read the complaint in the Pack-Kahn Action, Kahn read it "very superficially." (R. 428.) Kahn did not know whether the allegations in the Pack-Kahn complaint were true. (R. 428.) Kahn assumed the facts were correct because Pack and Kahn are "represented by good counsel" and Kahn has "faith in Mr. Chamberlain". (R. 428.) Kahn "assumed" Pack and Kahn had a dispute with Sterling Oil and its trustees based on "whatever" Chamberlain told him. (R. 426-7.)

Pack could not recall employing any lawyers to represent him in the Jett-Chamberlain Action. (R. 432). Pack was not familiar with the fact that he, Pack, had attempted to intervene in the Jett-Chamberlain action. (R. 432.) Pack stated that he would have to check his file to determine if some lawyer purported to act in his behalf in connection with the Jett-Chamberlain Action. (R. 433.) Pack would have to check with his attorney to determine whether he, Pack, attempted to intervene in the Jett-Chamberlain action. (R. 433.) Pack did know that Riddick represented Pack and Kahn in a "matter". (R. 434.) Chamberlain had arranged for Riddick's employment. (R. 434.) Pack did not "know anything at all about why Mr. Riddick stopped representing" Pack. (R. 437.) Pack did not recall any communication from any member of the Arendall firm. (R. 438.) Pack had not discussed the cases which he had pending with Arendall. (R. 439.) Pack had no memory of when he learned a suit had been filed in his name against Sterling Oil. (R. 444.) Pack did not know who Pack had sued in the Pack-Kahn action, Pack did not "read the complaint." (R. 477.) Pack acknowledged that he and Kahn "had no direct disputes with Sterling." (R. 448.) Pack assumed that Chamberlain had "a direct dispute with Sterling" and that what Pack and Kahn "were doing would be helping Mr. Chamberlain." (R. 448-9.) Pack had no knowledge of any claim by Zink, Smyth or Sterling Oil against Pack or Kahn or any property owned by Pack or Kahn. (R. 449-450.) Pack acknowledged that insofar as he was concerned that taking the case out of the jurisdiction of the federal court and putting it into the state court would have been a satisfactory reason for filing the suit if it would accomplish a pur-

pose. (R. 451-2.) Pack testified that whatever is alleged in the Pack-Kahn action came from Chamberlain. (R. 62.)

Jett discussed the filing of the Jett-Chamberlain Action with Chamberlain; Jett authorized Chamberlain to handle the legal aspects of the lawsuit; Chamberlain rather than Jett "actually contacted the lawyers"; and, Jett did not recall discussing the Jett Chamberlain Action with his attorneys. (R. 412-3.) Jett is and has been the owner of all of the outstanding capital stock of Geo. Jett Drilling. (R. 413, 416.) Jett did not know Geo. Jett Drilling had attempted to intervene in the Jett-Chamberlain Action. (R. 413.) To Jett's knowledge, Geo. Jett Drilling had never had any dispute with Zink, Smyth or Sterling. (R. 417, 418.) Jett knew of no property owned by Geo. Jett Drilling in which Sterling Oil claimed an interest. (R. 417.) Neither Zink, Smyth nor Sterling has ever made any claim against Geo. Jett Drilling. (R. 417.) Jett had never met with Pack or Kahn or with any attorney to discuss the filing of any lawsuit by Pack, Kahn and Geo. Jett Drilling. (R. 419.) Jett did not know whether he authorized Chamberlain to file any lawsuits in the name of Geo. Jett Drilling and if he had, Jett did not know who any such suit would have been filed against. (R. 420.)

Chamberlain and Corcoran met with members of the firm of Hamilton, Denniston, Butler & Riddick in connection with the Jett-Chamberlain Action and the Pack-Kahn Action. (R. 281.) The proposed complaint in the Pack-Kahn Action originally included Cornwall,

Equity and Ivanevic as parties plaintiff but had to be revised when Cornwall, Equity and Ivanevic refused to join as parties plaintiff. (R. 282.) After the Pack-Kahn Action was filed, the Hamilton firm assisted the Pillans firm is preparing answers in the Pack-Kahn Action for Cornwall, Equity and Ivanevic. (R. 282.) The Hamilton firm billed:

Mr. Bart B. Chamberlain, Jr.
Citronelle-Mobile Gathering System
Company, Ltd.
P.O. Box 1607
Mobile, Alabama

for its work in preparing the Jett-Chamberlain complaint, the petitions to intervene of Pack, Kahn and Geo. Jett Drilling, the Pack-Kahn complaint and the revision thereof and for assisting Cornwall, Equity and Ivanevic in preparing their answer to the Pack-Kahn complaint. (R. 281-283.)